IN THE

# Supreme Court of the United States

OCTOBER TERM, 1938.

## No. 25.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and Its Affiliated Companies, etc., *Petitioners,*

*against*

NATIONAL LABOR RELATIONS BOARD, *et al.*

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-825; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-839; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-832; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-826; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-828; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-829; AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-830, *Petitioners,*

*against*

NATIONAL LABOR RELATIONS BOARD, *et al.*

**(Consolidated Cases.)**

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF FOR PETITIONERS, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND ITS ABOVE-NAMED LOCAL UNIONS.

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# INDEX.

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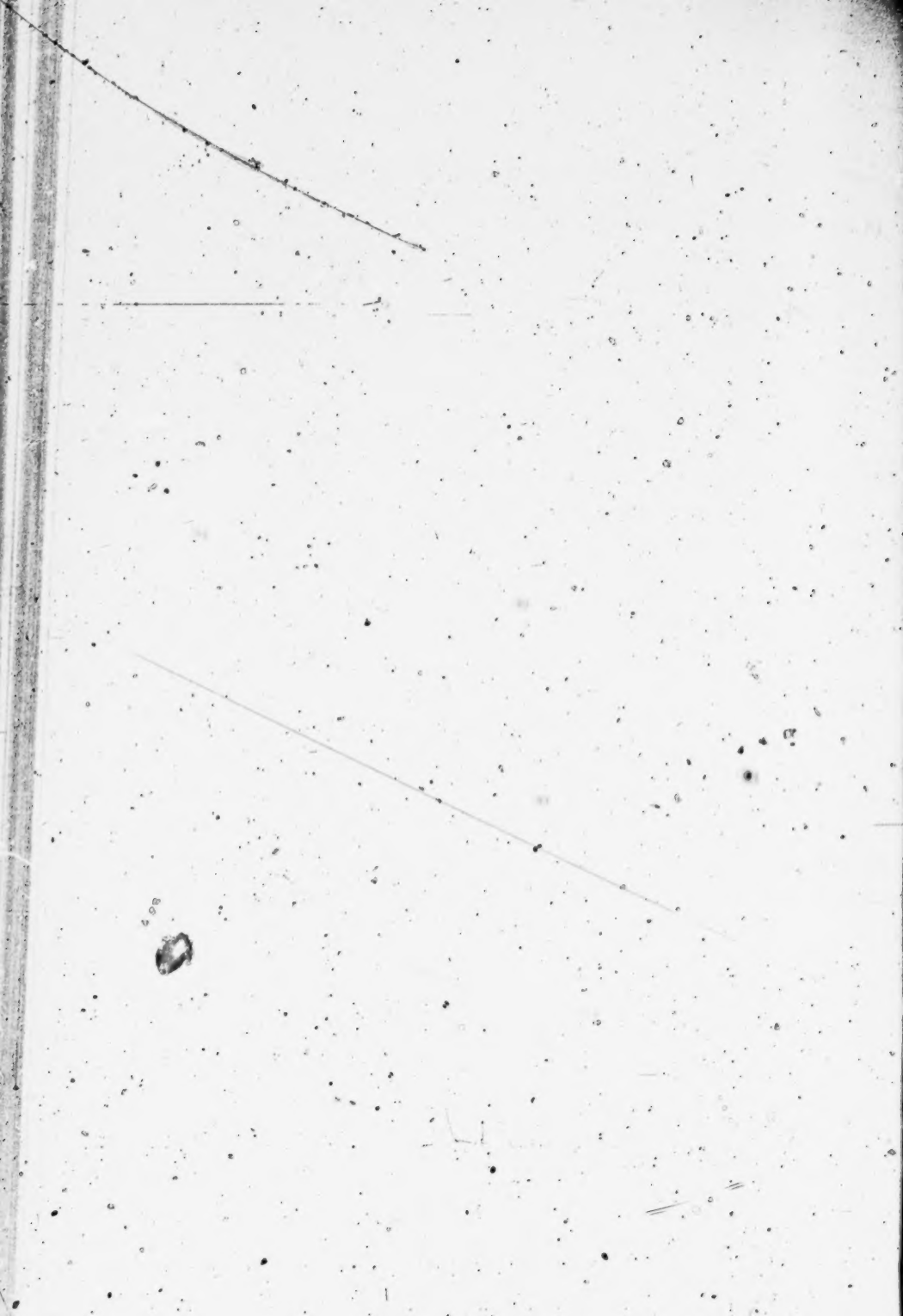
## Table of Cases Cited.

## Statutes and Rules Cited.

## Textbooks and Encyclopedias Cited.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1938.

## No. 25.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-825, AND THE OTHER PETITIONING LOCAL UNIONS, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR, *Petitioners,*

*against*

NATIONAL LABOR RELATIONS BOARD AND UNITED ELECTRICAL AND RADIO WORKERS OF AMERICA, AFFILIATED WITH THE COMMITTEE FOR INDUSTRIAL ORGANIZATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF FOR PETITIONERS, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND ABOVE-NAMED LOCAL UNIONS.

### OPINIONS BELOW.

The findings of fact, conclusions of law, and Order of the National Labor Relations Board (R. 65) are reported in 4 N. L. R. B. 10. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 1737) is reported in 95 F. (2) 390.

## JURISDICTION.

The jurisdiction of this Honorable Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 [U. S. C. Tit. 28, Sec. 347 (a)], and Section 10 (e) of the National Labor Relations Act of July 5, 1935, c. 372, Sec. 10, 49 Stat. 453 [U. S. C. Tit. 29, Sec. 160 (e)]. The date of the decision sought to be reviewed is March 14, 1938 (R. 1737), and the date of the judgment is March 21, 1938 (R. 1748). It was entered by the United States Circuit Court of Appeals for the Second Circuit in pursuance of its rulings refusing to set aside a final Order of the National Labor Relations Board of November 10, 1937, and directing that a request of said Board for the enforcement of said Order be granted. The matter came before the United States Circuit Court of Appeals for the Second Circuit pursuant to Section 10 (f) of the National Labor Relations Act, upon the several petitions of the Petitioners herein (R. 1554) and the Consolidated Edison Company of New York, Inc., and its affiliated companies, Brooklyn Edison Company, Inc., et al. (R. 1473), parties aggrieved by, and seeking a review and vacation of, the Order of the National Labor Relations Board of November 10, 1937. By stipulation of counsel for the National Labor Relations Board, Consolidated Edison Company of New York, Inc., et al., and International Brotherhood of Electrical Workers, et al., respectively (R. 1736), confirmed by the Court, the two Petitions for review under Section 10 (f) were consolidated and heard as one case on the calendar of the Circuit Court of Appeals, and the record certified to said Court by the National Labor Relations Board was accepted as

and declared to be the only record required to be certified, printed and filed in the case.

The petition for a writ of certiorari was filed on April 12, 1938, and was granted on May 16, 1938.

## QUESTIONS PRESENTED.

(1) Were Petitioners necessary or indispensable parties to proceedings abrogating and annulling their contracts?

(2) Were Petitioners entitled to notice of proceedings which abrogated and annulled their contracts?

(3) Were the alleged notice of hearing and alleged service of the original Complaint of May 12, and the alleged service of the amended notice of hearing of May 25, 1937, *legal and valid notice* in compliance with constitutional requirements of due process of law, and with Section 11 (4) of the National Labor Relations Act and Article V of the Rules of the National Labor Relations Board?

(4) Were Petitioners denied due process of law by Section 1 (f) and (g) of the Order of November 10, 1937, of the National Labor Relations Board, requiring Consolidated Edison and its affiliates to cease and desist from giving effect to their contracts with Petitioners and from recognizing Petitioners as the exclusive representatives of the employes of Consolidated Edison and its affiliates, when no question as to the validity of the contracts, or as to representation for collective bargaining, was raised in the charge of May 5 or the Complaint or any amended Complaint, or at the hearings, and the Board dismissed so much of the Complaint as involved any charges that Consolidated Edison and its affiliates had dominated or interfered with the formation or administration of, or

had contributed financial or other support to, Petitioners, contrary to Section 8 (2) of the Act?

(5) Does the National Labor Relations Act authorize the Board to exercise jurisdiction over these Petitioners in their labor relations with Consolidated Edison and its affiliates, which are local operating public utilities doing business wholly within New York, are not engaged in commerce as defined in the Act, and are subject to plenary regulation by New York under its Public Service Law and its State Labor Relations Act?

(6) Did the Order of November 10, 1937, of the National Labor Relations Board, abrogating and annulling the contracts of Petitioners, exceed the power of the Board and comply with the constitutional requirements of due process of law, the National Labor Relations Act, and with the Rules and Regulations of the Board (a) when hearsay and other illegal testimony was admitted before the Trial Examiner and made the basis of findings of fact by the Board, (b) when the Trial Examiner and the Board refused to hear evidence sought to be introduced by Consolidated Edison at the hearings, (c) when the Trial Examiner made no report or findings as contemplated by Article II, Section 32 of the Rules of the Board, and no opportunty was afforded to file exceptions to his report as contemplated by Section 34, (d) when none of the members of the Board saw or heard any of the witnesses who testified before the Trial Examiner, and (e) when the Board afforded no opportunity to any of the parties in interest affected by its final Order to be heard before the passage of the same, but entered its final Order without any hearing, much less a fair and full hearing "in accordance with the cherished judicial tradition embodying the basic concepts of fair play"?

## STATUTES INVOLVED.

This cause involves questions arising under the Constitution of the United States, the Fifth and Tenth Amendments thereto, and parts of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Sup. II, Title 29, Sec. 151, *et seq.*) The pertinent parts of the National Labor Relations Act will be found in Sections 1, 2, (6) and (7), 7, 8 (1), (2) and (3), 9 and 9 (c), 10 (a), (b), (c), (e) and (f), and 11 (4) thereof. There is also involved the construction and operation of the Rules and Regulations of the National Labor Relations Board, Series 1, as amended, particularly Article II, Sections 19, 29, 32, 34 and 37, and Article V. Sections 1 and 2.

Under the decision and Order of the Board and the decision and Order of the Court below, questions are presented as to the valid construction and applicability of the Act and of the Rules of the Board, the regularity and conformance of its proceedings, findings and Order to due process of law, the attempted jurisdiction of the Board, and the sufficiency of the support for its findings and Order.

## STATEMENT.

Petitioners herein are the International Brotherhood of Electrical Workers and seven of its Local Unions, all affiliated with the American Federation of Labor. The membership of these Locals numbers something over 30,000 out of 38,000 eligible employes of the Consolidated Edison Company of New York, Inc., and its six affiliated Companies, herein referred to as Consolidated Edison (4 R. 1505).

Contracts were executed in May and June, 1937, between the Brotherhood and its Locals, all of whose members were employes of Consolidated Edison, on the one hand, and the Consolidated Edison and its affiliated Companies, on the other. The contracts were each authorized by a majority of the employes of each of the Edison Companies and of the respective Local Unions which entered into them (4 R. 1504-1505). Reference to the contracts (4 R. 1581) will reveal that they are of the utmost importance with relation to the vital concerns and interests of the workers composing the several Locals in their employment. They contain provisions, among others, for a system of arbitration of disputes relating to employment and stipulate against strikes and lockouts, thus giving practical assurance against any cessation of service by the Companies with which they are made. These contracts were abrogated by the Board's Order of November 10, 1937.

Charges against the Consolidated Edison Company and its affiliates (1 R. 4) were filed with the Board on May 5, 1937, by the United Electrical and Radio Workers of America, herein called the United, an affiliate of the Committee for Industrial Organization. A Complaint (1 R. 7) embodying these charges was issued by the Board May 12, 1937. *Consolidated Edison and its said affiliates were the only parties who were made respondents or defendants in the Complaint and to the proceeding before the Trial Examiner and Board. Neither the Brotherhood nor the Locals were made parties, nor were they brought into the proceedings in any manner whatsoever. The charge of May 5, and the Complaint in its original form, as issued May 12, did not assert or prefer any charge against the Brotherhood or its Locals, nor did*

*the Complaint or any of the several amendments to it make any mention of the contracts or attack their validity or raise any question as to representation or election. Moreover, at no time during the hearings before the Trial Examiner was any statement made, by or on behalf of the Board or any of the parties, that the validity of the contracts or any question of representation or election was in issue. Statements were made by the Board's counsel that there was no question of representation involved* (1 R. 279). The Complaint was amended June 10 and 14 (1 R. 13, 14 and 15), after the hearings before the Trial Examiner were begun and substantially advanced. *No amendment until that of June 14 affected the Brotherhood or its said Locals under or within the Act.*

No legal notice, either actual or constructive, was at any time given to the Brotherhood or any of the said Locals of either the Charge filed by the United on May 5, the Complaint of May 12 or any of the amendments thereto, or of any action which contemplated the abrogation and annullment of their contracts and the consequent destruction of their property, contractual and personal rights. The methods of giving notice and the service of papers are provided for in the National Labor Relations Act, herein called the Act, in Section 11 (4), as follows:

> "Complaints, orders, and other process and papers of the Board, its member, agent or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof *at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same".*

Article V, Section 1 of the Rules and Regulations of the Board (Series 1, as amended) is the same as the above sub-section, and Section 2 of said article provides:

> "Service of papers by a party on other parties shall be made by registered mail or in any manner provided for the service of papers in a civil action by the law of the State in which the hearing is pending. *When service is made by registered mail, the return post office receipt shall be proof of service.* When service is made in any manner provided by such law, proof of service shall be made in accordance with such law."

There is in the Record (18-19) a Western Union Telegraph Messenger Errand Service ticket stating that on May 12, 1937, "3 packages" were sent to "United Elec Radio Workers 1133 Bway; Intl Brotherhood Elec Workers 103E25; Consolidated Edison Co 3 Irving Place". It also has on it: "Lu 3 IBEW D Kaplan". Just what was receipted for by "D Kaplan" does not appear other than the statement in the *ticket* that "3 packages" were sent. Who "D Kaplan" is, or what the position, status or authority of such person was, has never been made apparent. The letters and figure "Lu 3" presumably mean Local Union No. 3. *That is not one of the Local Unions of employes, Petitioners herein, in the service of any of the Consolidated Edison Companies.* Even the true address and place of business of Local Union *No. 3* is not "103E25" but 130 E. 25th Street. None of the Petitioners herein has an office, business, residence or address at either of those places. There is repeated testimony of Harold Straub, the main witness for the complaining C. I. O. Union, which brought the charge on May 5, 1937, and for the Board, that one of the Petitioners herein, Local Union B-829, had its offices in New Yorl

City at 60 East 42nd Street. Mr. Straub testified, in answer to the question of the Board's counsel—"What were those offices?"—"They were and are now the offices of Local B-829 of the International Brotherhood of Electrical Workers. They are located in 60 East 42nd Street in the Lincoln Building, Room 934". (1 R. 256. See also 273, 276, 277.) It will be further noted that the Contract of said petitioning Union, Local No. 829, was entered into by it with the Consolidated Edison Company of New York, Inc., itself (4 R. 1624).

Moreover, the affidavit of Sadie Jacobs, a Board stenographer, as to proof of service of the original Complaint and notice of hearing (1 R. 18) does not mention any service whatever on the International Brotherhood of Electrical Workers or any of its said Locals, nor does it refer to any messenger errand ticket or the sending of any package by such agency. Her affidavit refers exclusively to alleged service *by registered mail*, the numbers of which are specified in the affidavit. *No return receipts* are included, and it is clear that *the receipt numbers for registered mail mentioned in the affidavit relate only to the receipts for mail to the Consolidated Edison affiliate Companies named therein.*

With reference to the amended notice of hearing of the original Complaint (R. 34), sent out on May 25, the affidavit of Alan J. MacAdams (R. 35-36) states that the amended notice was served upon the Consolidated Edison and its affiliates, at their respective addresses, upon Robert H. Coulson, Esq., 40 Wall Street, N. Y. C., and "International Brotherhood of Electrical Workers, 130 East 25 Street, N. Y. C.", by sending to them "at the addresses indicated, by postpaid registered mail, return

receipt requested," the amended notice of hearing of May 25; that he received therefor from the U. S. Post Office, N. Y. receipts for registered articles, dated May 25, 1937, numbered 303160 to 303168, respectively, said receipts being attached as part of the affidavit. The copies of the post office receipts are omitted. *No return receipts are stated in the affidavit to have been received; and no such receipts are included in the Record.* In view of this omission in the Record and in order to ascertain whether or not there were any such return receipts, the Board, after the certified transcript of the Record had been filed by it and had been subjected to particular inspection upon the subject, was requested to search its files to ascertain whether it could find therein *any return receipt* for registered mail sent on or about May 25, 1937, to "International Brotherhood of Electrical Workers, 130 East 25 Street, N. Y. C.", at which place, as aforesaid, neither the Brotherhood nor its petitioning Locals had any residence, office, place of business or habitation. *No such return receipt was discoverable.*

The Complaint, as finally amended, charged that Consolidated Edison had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (2) and (3) and Section 2 (6) and (7) of the National Labor Relations Act. [July 5, 1935, 49 Stat. 449; 29 U. S. C. Section 158 (1), (2) and (3), and Section 152 (6) and (7).] *There was no allegation of violation of Section 9 (c) of the Act relating to representation or election.* And it was positively declared by the able counsel for the Board, on its behalf, that no such question was involved in the proceedings (1 R. 279).

Pursuant to amended notices to the Respondent Companies, none of which, as aforesaid, were served upon or directed to the International Brotherhood of Electrical Workers or any its said Locals, hearings were held before the Trial Examiner on June 3, 10, 11, 14, 15, 16, 17, 23 and 24 and July 6, 1937. The Brotherhood and its said Locals, not being parties, and not having been served with any legal notice, summons, citation or other process, took no part whatever in the proceedings before the Trial Examiner or the Board.

On June 14, 1937, an important and very radical amendment of the Complaint was made. This consisted of changing the figure "21" to "22" in paragraph "23" and in paragraph "24" of the Complaint. (R. 15).

The intent and effect of said Amendments of June 14, 1937, were to make the Complaint charge that the matters mentioned in paragraph "22" as to the Brotherhood "affected commerce" as defined in the Act, by bringing the allegations of paragraph 22 within paragraphs 23 and 24 of the original Complaint. By those Amendments the matters mentioned in paragraph 22 were brought *for the first time within the purview of the Act and within the jurisdiction of the Board.* The Complaint as thus basically and radically amended was never served upon the Brotherhood or any of said Local Unions, nor was any notice of the Complaint, as thus fundamentally modified, mailed or otherwise sent or delivered to the Brotherhood or any of the petitioning Local Unions.

On September 29, 1937, long after the conclusion of the hearings before the Trial Examiner in New York on July 6, 1937, and without any Intermediate Report upon his part, the Board summarily ordered the

proceedings to be *"transferred and continued"* before it at Washington, D. C., and, on November 10, 1937, announced its decision and order (1 R. 65 *et seq.*). The conclusions of law of the Board embraced findings that Consolidated Edison and its affiliates had violated Section 8 (1) and (3), and that these violations affected commerce within the meaning of Section 2 (6) and (7) of the Act. *The Board specifically found that there had been on violation within the meaning of Section 8 (2) of the Act.* The Order of the Board directed Consolidated Edison and its affiliates, *inter alia, to Cease and Desist from "Giving effect to their contracts with International Brotherhood of Electrical Workers", and "Recognizing the International Brotherhood of Electrical Workers as the exclusive representative of their employees".*

Pursuant to Section 10 (f) of the Act, Petitioners, the Brotherhood and its said Locals, upon learning of the passage of the Board's Order, as well as Consolidated Edison and its affiliates, on November 18, 1937, petitioned the United States Circuit Court of Appeals for the Second Circuit, as persons aggrieved by the final Order of the Board, to review and set aside the Order of November 10, as unconstitutional and void. Answers of the Board and requests for the enforcement of its Order were filed to these respective petitions (4 R. 1691 and 1711) to which replies were filed by the Petitioners (4 R. 1726 and 1734).

By stipulation (4 R. 1736) of counsel for the Board, Consolidated Edison and its subsidiaries, and the Brotherhood and its said Locals, it was agreed that the two said Petitions under Section 10 (f) be consolidated and heard as one case in the Circuit Court of Appeals, and that the record certified by the Board be the only record

required to be certified in the cases as consolidated. This stipulation was approved by the Court below, *per* his Honor, Judge Manton (R. 1737) and the cause proceeded accordingly. The Circuit Court of Appeals denied the two Petitions and ordered the Board's Order to be enforced and executed. Its action, with respect to both said Petitions, is under review herein upon certiorari granted by this Court on May 16, 1938.

## SPECIFICATION OF ERRORS TO BE URGED.

(1) The Circuit Court of Appeals erred in finding and holding that Petitioners were not necessary or indispensable parties to the proceedings before the Trial Examiner and the National Labor Relations Board, which resulted in the passage by said Board of its Order abrogating and annulling Petitioners' contracts and destroying their contractual, personal and property rights.

(2) The Court below erred in not finding and holding that Petitioners were entitled to notice of the proceedings before the Trial Examiner and the National Labor Relations Board, which resulted in the passage by said Board of the Order abrogating and annulling Petitioners' contracts and destroying their contractual, personal and property rights.

(3) The Court below erred in not finding and holding that the alleged notice and service of the original Complaint of May 12, and the attempted service of the amended notice of hearing of May 25, 1937, did not comply with constitutional requirements of due process of law, and did not comply with Section 11 (4) of the National Labor Relations Act and Article V of the Rules of the National Labor Relations Board.

(4) The Court below erred in finding and holding that Petitioners were accorded due process of law in the passage of Section 1 (f) and (g) of the Order of November 10, 1937, of the National Labor Relations Board, requiring Consolidated Edison and its affiliates to cease and desist from giving effect to their contracts with Petitioners and from recognizing Petitioners as the exclusive representatives of the employes of Consolidated Edison and its affiliates, when no question as to the validity of the contracts or as to representation for collective bargaining was raised in the charge of May 5, the original Complaint, or the Complaint as amended, or at the hearings, and the Board dismissed so much of the Complaint as involved any charges that Consolidated Edison and its affiliates had dominated or interfered with the formation or administration of, or had contributed financial or other support to, Petitioners, contrary to Section 8 (2) of the Act.

(5) The Court below erred in finding and holding that the National Labor Relations Act authorizes the National Labor Relations Board to exercise jurisdiction over the Petitioners in their labor relations with Consolidated Edison and its affiliates and over the matters complained of to the Board and ruled upon by it, and that the Act, as applied and administered by the Board in this case, complies with the Fifth and Tenth Amendments to the Constitution of the United States.

(6) The Court below erred in finding and holding that the Order of November 10, 1937, of the National Labor Relations Board, abrogating and annulling the contracts of Petitioners, was within the authority and power of the Board, and complied with the constitutional requirements

of due process of law as protected against violation by the Fifth Amendment to the Constitution of the United States, and with the Act and the Rules and Regulations of the Board.

(7) The Court below erred in upholding the Order of November 10, 1937, of the National Labor Relations Board and in sanctioning and affirming the admission before the Trial Examiner of hearsay and other illegal testimony upon which findings of fact were made by the Board, the rulings of the Trial Examiner and the Board refusing to hear important and pertinent evidence offered by Consolidated Edison, the procedure of the Trial Examiner who made no report or findings, and afforded no opportunity to file exceptions to his report as contemplated by Article II, Sections 32 and 34 of the Rules of the Board, the passage of the Order by members of the Board who neither saw nor heard any of the witnesses who testified before the Trial Examiner, whilst the Board afforded no opportunity to either Petitioners or other parties in interest to be heard before the passage of the final Order of November 10, 1937.

## SUMMARY OF ARGUMENT.

A. The Petitioners were necessary and indispensable parties to the proceedings before the Trial Examiner and the Board, and were entitled to legal notice thereof, in view of the invalidation of their contracts by the final Order of the Board. The unvarying rule of law, affirmed many times by this Court, requiring joinder and notice, is a fundamental and mandatory one and goes to the very foundation of due process of law and the protection of personal and property rights against unwarranted invasion and destruction. The main theory of the Board

in support of its position that these Petitioners were not entitled to either joinder or notice, namely, that the Order of the Board did not run against these Petitioners, is obviously untenable, because it would seem indisputable that if an order of a court or an administrative body is not based upon *notice* and does not run against *all persons to be injuriously affected* by it, then such order is for that reason alone abortive and without force as against individuals whose personal, property and contractual rights are destroyed or denied by it. If the Board's Order did not run against these Petitioners, by what warrant can it be said to be efficacious to cancel and annul these Petitioners' personal, contractual and property rights, upon which it directly and destructively operates? The Board's reliance, further, upon the *Pennsylvania Greyhound Lines* case to support its present position as to non-joinder of and lack of notice to these Petitioners would seem plainly futile because of the distinct dissimilarity of the two cases. There, the Board argued, and this Court held, that joinder and notice were dispensable because the union was totally company-dominated in thorough-going violation of the express terms of Section 8 (2) of the Act, and that, therefore, notice to the company was in fact notice to the union; whilst here, not only did the Board expressly find that Section 8 (2) of the Act was not violated by Consolidated Edison and its affiliates, but there is, moreover, no suggestion in the evidence that these Petitioners were other than *bona fide*, independent International and Local Labor Organizations, all affiliated with the American Federation of Labor, and comprising more than thirty thousand skilled and high-grade employes, who, to say the least, may be reasonably presumed to be incapable of being dominated and coerced.

The "Intervention" referred to in Section 10 (b) of the Act and Article II, Section 19 of the Board's Rules, is so absolutely discretionary and so partial and limited, that where substantive property and personal rights are involved, it seriously fails to gratify constitutional requirements.

B. Even if legal notice to these Petitioners of the proceedings before the Trial Examiner or before the Board could remedy the defect caused by not having joined them as parties to proceedings which culminated in the destruction of their rights, no legal notice of, or citation to appear to any stage of, the proceeding was ever served or attempted to be served upon them. Neither the provisions of the Act, Section 11 (4), nor of the Rules of the Board, Article V, Sections 1 and 2, referring to process and service, were complied with, nor was there any other effort to furnish these Petitioners with notice or otherwise to comply with the fundamental requirements of due process of law which guarantee notice and the right to be heard before abrogation or condemnation of personal and property rights. Legal service of process, it is argued by the Board, is shown to have been made because of the existence in the record of a telegraph messenger errand service ticket which the Board contends shows that notice of the original complaint of May 12 was left with an individual purporting to have received it on behalf of "Local Union No. 3" of the Brotherhood in New York City; similarly, an amended notice of hearing sent out by the Board to a different address of Local Union No. 3, by registered mail on May 25, is contended to show service on "Local Union No. 3". Disregarding, for the moment, differences in the addresses of "Local Union No. 3" in these two alleged notices, and other manifest de-

fects and omissions in the mode and proof of the two purported services, it is plain that, even if "Local Union No. 3" was served in the manner and to the extent argued by the Board, there was yet no notice to or service upon, either actually or constructively, these Petitioners, because "Local Union No. 3" was not one of the Local Unions whose members were employes of Consolidated Edison or its affiliates, nor was it one of the Local Unions whose contracts were abrogated by the Board. Service on "Local Union No. 3", assuming it to have been made, was not a service on these Petitioners or the International Brotherhood of Electrical Workers. International labor unions are entities, separate and distinct from the members who compose them and from the Local Unions, as much so as a corporation is an entity separate and distinct from its stockholders or from a subordinate organization. No explanation or reason has been advanced by the Board as to why it chose, in its alleged attempts at service, "Local Union No. 3", rather than these Petitioners, or any one of them, as would have been manifestly the proper course of procedure in order to comply with due process of law. The Building and Office of the International Brotherhood in Washington, D. C., must have been well known to the Board, and, indeed, the address of the "principal office or place of business," where service of process is, by Section 11 (4) of the Act, required to be made, of Local Union No. B-829, one of Petitioners, whose members were employes of Consolidated Edison and whose contract was destroyed by the Board's Order, was repeatedly mentioned in the testimony of one of the Board's leading witnesses (Straub) as definitely known at and long prior to the date of the amendments of June 14, to the Complaint. (1 R. 256, 273, 276, 277.)

C. The Order of the Board abrogating the contracts of Petitioners and destroying their personal, contractual and property rights, without their having been made parties to the proceedings and without notice to them of the pendency of proceedings actually or potentially against them, was and is null and void, because the abrogation of the contracts or their validity *vel non* was never an issue in the pleadings or at any stage of the proceedings. The charge of May 5; and the original Complaint of May 12, did not mention or prefer any charge against Petitioners, nor did any of the several amendments make any mention of the contracts or attack their validity or raise any question as to representation or election. Moreover, at no time during the hearings before the Trial Examiner was any statement made by anyone that the validity of the contracts, or any question of representation or election, was in issue but, on the contrary, statements were made during the hearing by the Board's counsel that there was no question of representation involved (1 R. 279). The jurisdiction of the Board was limited to the relief prayed for or sought, and it did not extend to the granting of relief not embraced in or contemplated by the Charge, the Complaint or the amended Complaint. A proceeding brought for one cause of action and an order made for another are basically irreconcilable with common justice and the law of the land, because such a course of action contains no notice to the party affected of the claim against him, or of the proposed action upon it, and no opportunity to be heard in protest or defense against it.

Section 1 (f) and (g) of the Order of the Board abrogating Petitioners' contracts and outlawing the Local Unions as bargaining representatives of the employes,

being neither referable to nor predicated upon the pleadings in the case, was illegal, as a denial of due process of law in its requirements of a reasonably definite charge or claim against a party who may suffer punishment, loss or prejudice by the decision, and of notice of such charge or claim with hearing and opportunity to protect or defend himself.

D. The National Labor Relations Board has no jurisdiction over the Consolidated Edison Company and its affiliates, or over its labor relations with Petitioners, including the contracts which the Board's Order destroyed, because said Companies and their employes are not engaged in commerce as defined in the Act and their labor relationships do not burden such commerce. The activities of the Consolidated Edison Company and its affiliates are intrastate within the meaning of the Commerce Clause of the Constitution of the United States and are, therefore, with regard to labor relations, subject to the jurisdiction of the Labor Relations Board of New York. Because of the intrastate character of the business conducted by the Consolidated Edison Company and its affiliates, the National Labor Relations Act, as applied by the Board in this case, conflicts with the Tenth Amendment to the Constitution of the United States. The National Board is without jurisdiction over the labor relations of Consolidated Edison and its affiliates because there is no clear justification of the exercise of the federal power. Consolidated Edison and its affiliates, being domestic corporations of New York, carrying on intrastate business, are not, in their labor relations, subject to jurisdiction of the National Board, but to jurisdiction of the State Board because federal is relinquished to state power where its exercise involves control of or interference with the internal affairs of such a corporation.

E. The Order of the Board annulling Petitioners' contracts exceeded the power of the Board, and the proceedings leading to the Order did not comply with the Act or the Board's Rules, and constituted a denial of a fair and full hearing and of due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

F. By the Board's Order destroying Petitioners' contracts the basic principles of evidence and procedure essential to the requirements of a full and fair hearing and to due process of law were violated, in that gross and remote hearsay and other illegal evidence was, over objection of counsel for Consolidated Edison, admitted and made the basis in great part of said Order; competent evidence was rejected; the testimony of important witnesses in behalf of Consolidated Edison, although these witnesses were present in the hearing room, was not allowed to be presented; the Trial Examiner made no intermediate report or findings as contemplated by its Rule, Section 32, Article II; the findings were made only by Board members, who had heard none of the evidence, whilst the Board did not afford Consolidated Edison any hearing before it, as required by Sections 29 and 37 of Article II of the Board's Rules, although such a hearing had been requested by counsel for Consolidated Edison (1 R. 19, 20, 21, 39), and the latter were given no opportunity for oral argument or for the submission of a brief to the Board, they having submitted a brief only to the Trial Examiner, in aid of his preparation of findings, which he never made. In view of the non-joinder in the proceedings of these Petitioners, and the failure of legal notice to them of the existence or pendency of the same, and also because of

the total lack of any issue touching the validity of their contracts which the Board's Order destroyed, the many and serious aberrations by the Board from traditional and requisite procedure have resulted in such grave detriment and injury to Petitioners as to call for the reversal of the judgment of the Circuit Court of Appeals for the Second Circuit.

## ARGUMENT.

### I.

**Petitioners were indispensable parties to the proceedings before the Trial Examiner and the Board, and were entitled to legal Notice thereof, in view of the invalidation of their contracts by the Board's final Order. But the Petitioners did not receive legal Notice of the proceedings, nor were they made Parties to the Proceedings, or notified or cited as Parties interested therein.**

The case relied on by the Court below in denying Petitioners' contention that it was a necessary party, namely, *National Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, presented an entirely different factual and legal situation from the instant case. There the Employees' Association was not, as here, a *bona fide,* independent and fully recognized labor organization, but was found to be wholly a company-dominated union in violation of Section 8 (2) of the Act (violation of this Section was dismissed here), and the control of the management so permeated every aspect of the Association's operations, as argued by the Government there (See Board's petition for writ of certiorari in *Pennsylvania Greyhound* case, No. 413, October Term, 1937, p. 17), that "*the Association and the management cannot be regarded as separate entities.* * * * *Notice to respondents* (management) *was*

*thus in any event notice to the Association.*" And further:

> "Nor is the argument that 'the union enjoined has not been notified or heard, entitled to any weight. * * * *If it were true that Employees Association was 'enjoined' by the Board's order it will be readily conceded that the Association would have been an indispensable party and should have been joined.* But the Board's order is not addressed to the Employees Association, *it imposes no obligation upon the Association, and the Association is not bound by it in any way. The order is directed solely against respondents and restrains their conduct only.*"

And the Board as a further reason for its position pointed out that the Association there, after the Board's decision was made public, *did not petition for review under 10 (f)*, as was immediately done by the Petitioners here.

It is thus evident that there is no fair or substantial parallel between the *Greyhound* and the instant case. There the question was merely as to the disestablishment of a company-dominated union; here solemn agreements providing for a system of arbitration of disputes relating to employment and stipulating against strikes and lockouts were struck down. There the Government's position was that the management and the Association were one; here the facts and the *finding of the Board* are the reverse of that proposition. There was no application by the Association for review under 10 (f) there; while here Petitioners applied for review immediately upon publication of the Board's Order. There the Government conceded that if the Association was *enjoined* by the order, or if the order had imposed obligations on or bound

the Association, it would have been an indispensable party. Here, Petitioners are, in plain effect, affirmatively *enjoined* from exercising contractual rights, and of this there can be no dispute, although the Order runs only to Consolidated Edison and its affiliates, because the only possible and inevitable result of the Order is to dissolve Petitioners' contractual obligations which would otherwise be binding and in full force and effect.

*General Inv. Co.* v. *Lake Shore, etc., R. Co.*, 260 U. S. 261, 285-286, cited by this Court in the *Greyhound* case as authority for the ruling that the Association was not an indispensable party, may well be cited as authority for Petitioners' position upon that subject in the case at bar. That case involved a suit by a shareholder to prevent two corporations from carrying out an agreement for a consolidation, *where the agreement had not yet been ratified or executed;* but this Court held that as to certain allegations of the bill which affected *joint rights* both parties were indispensable parties, saying (285):

> "As to so much of the bill as sought to enjoin the New York Central Company from voting its shares in the Lake Shore Company and to enjoin the latter from permitting it to vote them, *we think it is obvious that the New York Central Company was an indispensable party, and that with it neither appearing nor reached by any effective process no other course was open than to dismiss that part of the bill. Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235, 246; *Taylor & Co.* v. *Southern Pacific Co.*, 122 Fed. 147, 152, 154."

All persons having a substantial interest of property or liberty in the subject matter or object of a proceeding are indispensable parties to it. The Order of November

10, 1937, destroyed property, personal and contract rights of inestimable value to, and inflicted irremediable injury upon, the Petitioners herein. *Nevertheless, they were neither named nor brought in as parties to the proceedings, and were not before the Board, actually or constructively, when it ordered the destruction of their rights.* Therefore, it is respectfully submitted, the omission of these Petitioners as indispensable parties to this proceeding renders the whole proceeding, and particularly the Order of the Board, so far as it prejudiced these Petitioners in the grave aspects of which they complain, unconstitutional and void.

*Mallow* v. *Hinde*, 12 Wheat. 193, 6 L. ed. 599.
*Barney* v. *Baltimore*, 6 Wall. 280, 18 L. ed. 825.
*Russell* v. *Clark*, 7 Cranch 69.
*Shields* v. *Barrow*, 17 How. 130, 15 L. ed. 158.
*Gregory* v. *Stetson*, 133 U. S. 579, 33 L. ed. 792.
*Swan Land, etc. Co.* v. *Frank*, 148 U. S. 603, 37 L. ed. 577.
*Nashville, etc. R. Co.* v. *Orr*, 18 Wall. 471, 21 L. ed. 810.
*Ribon* v. *Chicago, etc. R. Co.*, 16 Wall. 446, 21 L. ed. 367.
*Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235, 46 L. ed. 499.
*Garzat* v. *DeRubio*, 209 U. S. 283, 52 L. ed. 794.
*Lee* v. *Lehigh Valley Co.*, 267 U. S. 542, 69 L. ed. 782.
*Commonwealth Trust Co.* v. *Smith*, 266 U. S. 152, 69 L. ed. 219.
*Niles-Belmont-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77, 65 L. ed. 145.
*Gen'l Inv. Co.* v. *Lake Shore, etc. R. Co.*, 260 U. S. 285.

In *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 381, 81 L. ed. 289, 293, this Court said:

> "It is conceded, and rightly so, that the district court was without personal jurisdiction of the defendant, and that in the absence of such jurisdiction the court was without power to proceed to an adjudication. * * * In this instance the dispute or controversy was not properly within the jurisdiction of the district court unless * * * (3) the defendant was before the court by reason of a general appearance or *a valid service of process. Each of these elements of jurisdiction was essential, and if any was wanting there was an absence of proper jurisdiction. The defendant was not before the court, and therefore it was without jurisdiction to proceed with the suit.* Counsel for the petitioner assume that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one. *By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit in personam, such as the one now under discussion; is an essential element of the jurisdiction of a district (formerly circuit) court as a federal court, and that in the absence of this element the court is powerless to proceed to an adjudication.*"

The Board now contends that the Petitioners were protected under the Act by the provision for intervention contained in Section 10 (b), and by the right to challenge the Board's Order pursuant to Section 10 (f) thereof. It is respectfully submitted that this contention of the Board in no regard answers the Petitioner's claim on this point, because the "Intervention" referred to in Section 10 (b) of the Act and Article II, Section 19, of the Rules of the Board is so absolutely discretionary and so partial and limited, that, where substantive property and personal rights are involved, it

seriously fails to gratify constitutional requirements. Moreover, in the proceeding herein involved, three days of the hearing had elapsed and fundamental testimony had been introduced before the Trial Examiner prior to the amendment to the Complaint of June 14, affecting the Petitioners within the Act.

Section 10 (b) of the Act provides:

> "* * * *In the discretion* of the member, agent or agency conducting the hearing or the Board, any other person may be *allowed* to intervene in the said proceeding and *to present testimony.* * * *"*

Article II, Section 19, of the Board's Rules and Regulations provides:

> "* * * *The Regional Director shall rule upon all such motions filed prior to the hearings;* and the Trial Examiner *shall rule upon all such motions filed at the hearing,* in the manner set forth in Section 15 of this Article. The Regional Director or the Trial Examiner, as the case may be, *may* by order *permit* intervention in person or by counsel *to such extent and upon such terms as he may deem just.* * * *"*

These provisions do not *secure a right* to intervene to any person. The Act itself, Section 10 (b), leaves the matter absolutely *"in the discretion"* of the member, agent or agency conducting the hearing, or the Board. Moreover, the text of the Act is that any other person than the party respondent against whom the complaint is issued *"may be allowed"* to intervene, but unquestionably, is not given the *right* to intervene. Furthermore, if intervention in said *"discretion"* be *"allowed"*, it is limited by the Act to the sole privilege *"to present testimony"*. Nothing further or beyond that to secure the "full hearing", required by due process of law, as amply shown by

the authorities cited herein, is provided. This falls far short of the rights guaranteed by the Constitution of the United States under the Fifth Amendment.

The Rule of the Board above quoted from Article II, Section 19, cannot, and does not, enlarge the said limited provisions of Section 10 (b) of the Act. If anything, it narrows it by the provision that the Regional Director shall "rule" upon all applications to intervene prior to the hearing, and the Trial Examiner shall "rule" upon all filed at the hearing; and that the Director or the Examiner, as the case may be, *may*, by order *"permit"* intervention *"to such extent and upon such terms as he shall deem just."* This substitutes *personal discretion* of the Director or the Examiner for the *security* afforded by *definite provisions* of law. The *law* does not *secure* the *right* to intervene, but the *discretion* of the Director or Examiner *may grant or deny* it, and, if granted, *fix its extent and terms*, as a matter of fortuity, favor or grace.

Illustration is afforded by the fact that on June 10, 1937, before the hearing was begun, the Trial Examiner *denied* two petitions of two separate labor organizations to intervene (R. 134-141; 163-164).

It would be superfluous to argue that, where substantive rights of property or persons are involved, the discretionary and limited provisions of both the Act and of the Rule fail to secure or protect rights guaranteed by the fundamental law. Any *notice* of a complaint to any person, other than a party respondent against whom the complaint is issued, is constitutionally ineffective and worthless; and the process, citation or notice, required by due process of law, are all unconstitutionally wanting.

Moreover, in the proceeding before the Trial Examiner, three full-day hearings were had, and foundational

testimony of the Board's leading witnesses had been taken, before the Complaint was so amended as, for the first time, to embrace any allegation concerning the Petitioners within the Act.

In 21 Corpus Juris, Equity, Sec. 277, page 282, it is said:

> "All the parties to a contract are ordinarily indispensable parties to a bill in equity for its enforcement, *or for its rescission and cancellation,* or reformation, or to enjoin its performance *or its breach,* particularly where they have joint or common rights or liabilities. The rescission of an agreement requires the presence of all claiming property through such agreement."

It is further said in 21 Corpus Juris, Equity, Sec. 276, page 273, in reference to indispensable parties:

> "This class includes all persons who have an interest in the controversy of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Accordingly, persons whose interests will necessarily be affected by any decree that can be rendered are necessary and indispensable parties, and the Court will not proceed to a decree without them."

Continuing, the said section of Corpus Juris, at page 277, further says:

> "The principle underlying the rule as to indispensable parties is fundamental and underlies the administration of justice in all courts of equity. It is that no proceedings shall take place with respect to the rights of any one, except in his presence. The rule as to indispensable parties is neither technical nor one of convenience, but is of imperative obligation."

In 1 Foster, Fed. Pr. (6th ed.), Section 120, page 724, it is said:

> "*Parties indispensable to a decree.* No suit, however, can proceed unless the court have before it as parties all persons who will be directly affected by the decree sought, or whose obedience is necessary to its enforcement, when it does not appear that they consent thereto. A person is affected by a decree when its rights against, or liability to, any of the parties to the suit is thereby determined. * * *
>
> "Every party to a contract, whether of sale or for another purpose, except one who has released or assigned his interest * * * is a necessary party to a suit to enforce it; or to set it aside."

See also section 110, pp. 677-678; section 120, pp. 726-727.

## II.

**Neither the attempted service upon Petitioners of the notice of May 12, nor that of the amended notice of May 25, 1937, was a valid service of notice or process, or compliance with Section 11 (4) of the Act, or Article V of the Board's Rules, or with the constitutional requirements of due process of law. And after the Amendments of June 14, 1937, by which Amendments these Petitioners were, for the first time, made the subject of charges in the Complaint within the National Labor Relations Act, there was absolutely no pretense of an attempt in any form to give Notice to these Petitioners, or any of them, of any charge in the Complaint against them.**

The provision of the Act, Section 11 (4), (*ante*, p. 7) referring to process and service, whether by mail, telegraph or personally, specifies that it must be made at "the principal office or place of business of the person

required to be served," and Article V, Section 1 of the Board's Rules is to the same effect. Neither of the two attempts at service here was directed to the principal office or place of business of either the Brotherhood or any of its said Local Unions, but each time there was an attempt to serve Local Union No. 3 of the International Brotherhood of Electrical Workers, 103 or 130 East 25 Street, N. Y. C., none of the members of which are employes of Consolidated Edison or its affiliates, and which is not one of the Local Unions whose contracts were destroyed. As to proof of service, the Act, Section 11 (4) provides that the "*verified* return of the *individual so serving the same setting forth the manner of such service shall be proof of the same,* and the *return post office receipt* or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid *shall be proof of service of the same.*" The purported service of May 12, 1937, was apparently attempted to be made by telegraph errand service but, as set forth in the Statement hereinabove, the receipt for the same (R. 18-19) is woefully deficient in showing anything that can be regarded as a valid service of notice or process on the Brotherhood or its said Locals. On the contrary, it shows, if anything, that "packages" were left with an individual who may or may not have been connected with a local union which was not one of the Local Unions of employes of Consolidated Edison or any of its affiliates, nor a union whose contract was nullified by the Board's Order. Moreover, the affidavit (1 R. 17-18) wholly omits any reference to the telegraph errand service ticket. This receipt, in the light of the authorities hereinafter cited, wholly fails to show a valid or effective service of the Complaint and notice of hearing of May 12 upon these Petitioners.

Similarly, the affidavit of the clerk—stenographer (1 R. 35-36) fails to show a valid or effective service of the amended notice of hearing of May 25 upon the Brotherhood or the Local Unions of employes in the Consolidated Edison System, but shows that the notice was sent to "International Brotherhood of Electrical Workers, 130 East 25 Street, N. Y. C.", which is not, as aforesaid, one of the Local Unions whose contracts were destroyed or whose members are employed in the Consolidated Edison System. The *return receipts* are omitted from the record, *no "return receipts" are stated in the affidavit to have been received, and no such receipts are included in the transcript.* Moreover, search by the Board among its files failed to disclose any return receipt from "International Brotherhood of Electrical Workers" which has not and never had any residence, office, or place of business at "130 East 25 Street, N. Y. C." No effort was ever made to serve the Brotherhood, whose office in Washington, D. C., is well known, or any of the Local Unions whose contracts were destroyed. The Record, testimony of Mr. Straub, shows that the office of Local Union B-829 of 60 East 42nd Street in New York City was definitely known and there could not have been any difficulty in locating the offices of the other petitioning Local Unions in New York City, or sending the required notice by personal service or by registered mail to the offices of the International Brotherhood, which occupies a large building, known as the I. B. E. W. Building at 1200 Fifteenth Street, Northwest, Washington, D. C. That there was no proper or valid service is affirmatively manifest.

The general principle here directly applicable is well settled and familiar, that where a special administrative board or tribunal is clothed with jurisdiction for particu-

lar purposes, such jurisdiction, in cases in which its exercise is attempted, must be affirmatively shown by the proceedings themselves to have been acquired. Such special jurisdictoin is never presumed, but must positively appear to support judgments or decisions purporting to be within it. And, as is well known, this rule applies especially to administrative boards and tribunals of the Federal Government.

The proposition last stated is found in innumerable judicial devisions, of which perhaps none states it more distinctly than Mr. Justice Field for this Court in *Galpin* v. *Page*, 18 Wall. 350, 21 L. Ed. 959.

In *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 35 S. Ct. 625, 59 L. ed. 1027, this Court condemned a statute as embodying provisions repugnant to due process with respect to *lawful and valid notice*. The principles there discussed and applied in the elaborate Opinion of this Court are cogently applicable to the facts at bar. In the course of its exposition of the various aspects of the subject, this Court said:

> *"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires.* In *Stuart* v. *Palmer*, 74 N. Y. 183, 188, * * * the Court said: *'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this Court."*

See also:

> *U. S. ex rel Turner* v. *Fisher*, 222 U. S. 204, 56 L. ed. 165.

In *Galpin* v. *Page*, 18 Wall. 350, 21 L. ed. 959, above, Mr. Justice Field emphatically said:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, *until he has been duly cited to appear*, and has been afforded an opportunity to be heard. Judgment without *such citation* and *opportunity* wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

In *1 Foster Fed. Pr.* (6th ed.) Sec. 167 A, p. 972, it is said:

> "A statement that service has been made upon the defendant's agent does not authorize the presumption that such agent had the right to receive service of process."
>
> *Boultbee* v. *International Paper Co.*, 229 Fed. 951.

The "*process*" required to be made or served upon individuals, whose *property or personal rights are to be disposed of* by the adjudication of a cause, must bring or summon such individuals into the cause and require their actual or constructive presence before the Court.

> *Employers, etc. Corp.* v. *Bryant*, 299 U. S. 374; 81 L. Ed. 289.

That service on Local Union No. 3 was, in law, *not* a service on any of the petitioning Local Unions herein, or the International Brotherhood of Electrical Workers, all of whom are profoundly interested in the matters which the Board dealt with as within the Complaint and determinable thereupon, has been often judicially declared.

> *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 60 L. Ed. 975.

In *Dean* v. *International Longshoremen's Ass'n, et al.*, (Dist. Ct. La.), 17 Fed. Supp. 748, directly in point, the Court said:

> "As was pointed out by the Supreme Court in *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 345, 42 S. Ct. 570, 66 L. ed. 975, these *international labor unions* are entities, separate and distinct from the members who compose them and from the *local organizations*. It is true that case did not involve a question of citation or jurisdiction, but, if it be true, as must be conceded, that they have rights as juridical personages distinct from the members or locals who compose them, then it necessarily follows that they cannot be brought into Court by service merely upon a member, but must be cited through someone having authority either expressed or necessarily implied from his relation to the association or the duties which he discharges. Mayo has not been shown to possess any such authority. * * *. See *Christian* v. *Inter. Ass'n of Machinists*, 7 F. (2d) 481; *Singleton* v. *Order of Ry. Conductors*, 9 F. Supp. 417."

In *Christian* v. *International Ass'n of Machinists, et al.* (D. C. Ky.), 7 Fed. (2) 481, also directly in point, the Court said:

> "*So, also, it must be held that the chairman or any other officer of a local union is not a representative of the International Union for service of process.* There is no more reason for holding that he is than that a mere member of such union is. As to some of the defendants the individual on whom process was served sustained no official relation to a local union. It would have made no difference if he did. * * * It should be noted that in the *Coronado* Case, the Supreme Court, through Chief Justice Taft, said: 'For these reasons, we conclude that the International Union, the District No. 21, and the

27 local unions were properly made parties defendant here, and properly served by process *on their principal officers.'*

*"• • • It is not to be blinked at that these unions, International and local, artificial units and entities, and suable as such, cannot be brought before the Court, save by service of process on a direct representative, whose relation thereto is such that it is reasonable to infer that the service of such process on him will be brought home to the union which he represents. They are entities, distinct and separate from their membership and subordinates, as much so as a corporation is an entity distinct from its stockholders or subordinate organiation."*

In 63 *Corpus Juris,* Trade Unions, Sec. 94, p. 705, it is said:

*"On the other hand, service of process on an officer of a local union and a member of a general union is insufficient to give the court jurisdiction of the latter."*

See also:

*Coronada Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 45 S. Ct. 551, 69 L. ed. 963.

*United Brotherhood of C. & J.* v. *McMurtery,* 179 Okla. 575, 66 Pac. (2) 1051.

*Singleton, et al.,* v. *Order of Ry. Conductors of America, (D. C. Ill.),* 9 Fed. Supp. 417.

*United Mine Workers* v. *Pennsylvania Mining Co.* (C. C. A. 8), 300 Fed. 695.

*Pennsylvania Mining Co.* v. *United Mine Workers,* (C. C. A. 8), 28 F. (2nd) 851.

## III.

**Petitioners were denied due process of law by Section 1 (f) and (g) of the Board's Order, abrogating their contracts and directing non-recognition of the Brotherhood as representatives of the employes, when neither the validity of the contracts, nor representation, was in issue, or embraced, in the Charge, the Complaint or Amended Complaint, or raised at the hearings or at any other time before the Board's final Order, and the Board itself dismissed so much of the Complaint as involved company domination or support contrary to Section 8 (2) of the Act.**

Even if notice of the original Complaint and hearing upon it had been served upon Petitioners prior to the amendments of June 14, 1937, the Complaint did not contain or make any charge of unfair labor practices or of any offense affecting commerce and within the Act against Petitioners, and, therefore, did not give them any information or notice of any such charge. The Complaint, moreover, made no reference whatever to the contracts or to representation for collective bargaining dealt with by the Board's Order.

The precise point here presented was adjudicated in *Morgan* v. *United States*, 304 U. S. 1, in which this Court said:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to *know* the claims of the opposing party and to *meet* them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. *Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly*

*advised of what the Government proposes and to be heard upon its proposals before it issues its final command."*

This point was also adjudicated in the recent decision of this Court in *U. S.* v. *Seminole Nation*, 299 U. S. 417, 421-422, 81 L. ed. 316, 318-319. The Opinion of the Court by Mr. Justice Butler, collating the Supreme Court decisions on the subject, discusses it as follows:

> "The jurisdiction of the lower court was limited to claims sued on before the expiration of the period within which the United States consented to be sued. *It did not extend to any cause of action which was not alleged in plaintiff's original petition. * * * The judgment may not be sustained as to any item that is not included in a cause of action set up in the original petition or that was by the findings of the lower court or otherwise put upon a ground not there alleged. Harrison* v. *Nixon*, 9 Pet. 483, 503, 9 L. ed. 201, 208; *Boone* v. *Chiles*, 10 Pet. 177, 209, 9 L. ed. 388, 399; *Garland* v. *Davis*, 4 How. 131, 148, 11 L. ed. 907, 915. *It may not be upheld as to any item that is not supported by definite findings of fact extending to all essential issues and which, unaided by statements in the court's conclusions of law or its opinion, are clearly sufficient to entitle plaintiff to recover. United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205, ante, 123, 57 S. Ct. 159."

See also:

*Windsor* v. *McVeigh*, 93 U. S. 274, 23 L. ed. 914.

*Arredondo* v. *Arredondo*, 223 U. S. 376, 56 L. ed. 476.

*New Orleans* v. *Citizens Bank*, 167 U. S. 371.

*Washington, A. & G. R. Co.* v. *Washington*, 10 Wall. 299.

Due process of law guaranteed by the Constitution requires definite information and notice to the person whose rights are to be affected by any proceeding in a court or before an administrative board or tribunal, of the claim or complaint against him, as well as of the order or judgment sought. The notice must be such that the person to be affected by the proceeding may be advised from it of the charge or claim against him, and of the relief sought from the court or other tribunal wherein the charge, claim and application for the relief are preferred. Judicial decrees or judgments, or administrative adjudications and orders, affecting the liberties or property of citizens, in the absence of such notice to the party to be affected, violate the fundamental principles of our law and cannot be sustained. It is an axiom not only of constitutional law, but of pleading and practice, that one may not bring a suit or proceeding for one cause of action and recover a judgment for another, much less recover an order or judgment taking away property, or of conviction for offense, without notice of the claim or charge upon which the order or judgment is founded. The decisions to that effect are virtually without number.

These principles are vigorously asserted, and the authorities sustaining them collated, in *In re Rosser*, 101 Fed, 562, (C. C. A. 8th, per Circuit Judge Sanborn) a leading and frequently followed case on this subject, to which this Honorable Court is particularly referred upon the point here under consideration.

After reviewing the authorities and the proceedings leading up to the final order, Judge Sanborn said (568):

> "Such a proceeding *lacks every element* of due process of law. It contains *no notice* to the party

The decision in the *Santa Cruz Fruit Packing Co.* case, decided by this Court March 28, 1938, two weeks after the decision and a week after the judgment rendered herein by the Circuit Court of Appeals, does not dispose of the question of jurisdiction as herein presented, inasmuch as in that case about 37 per cent of the total output of the employer was shipped in interstate or foreign commerce, wherein *"there was a constant stream of loading and shipping of products."* Moreover an *actual strike* had been in progress, with a *cessation* of the flow of extensive commerce. Furthermore there was no question at all raised or presented as to the adequacy of State regulation, there being no State regulation of the business of the employer or of its labor relations with its employes. The Consolidated Edison System, conducting definitely an intrastate business, sells only to persons within the State of New York, a few of whom themselves apply the utility produced and sold to them in New York in interstate commerce. A relatively small amount, not comparable in percentage of the whole to the 37 per cent in the *Santa-Cruz Company* case, finds its way not from the Consolidated Edison System, but only indirectly and remotely through a few of its customers in New York City and State, into interstate commerce. The wholly intrastate public utilities of the Consolidated Edison and its affiliates are subject to plenary State regulation, comprehending every feature of production, distribution and service, and particularly including its labor relations with the Petitioners, under the State Labor Relations Act. There has never been any finding or suggestion that the State Labor Relations Act and State Board have been or are in any way inadequate to prevent conditions which might prejudice either intrastate or interstate commerce. It is respectfully submitted that the facts and conditions dis-

closed by the Record in this case contravene the existence of "such a *close and substantial* relation to interstate commerce that their control is *essential or appropriate* to protect that commerce from burdens and obstructions". As declared by this Court in its recent decisions, the federal power "*must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them * * * would effectually obliterate the distinctions between what is national and what is local and create a completely centralized government. The question is necessarily one of degree*" (*Jones & Laughlin case*, at p 37).

The principle involved is that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear (*Florida* v. *United States*, 282 U. S. 194, 211); and that the federal should be relinquished to the state power, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the State (*Pennsylvania* v. *Williams*, 294 U. S. 176, 185, *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315).

## V.

**The Order of the Board annulling Petitioners' contracts exceeded the power of the Board, and the proceedings leading to the Order did not comply with the Act or the Board's Rules, and constituted a denial of a fair and full hearing and of due process of law, in contravention of the Fifth Amendment.**

An administrative board of the Federal Government has only the powers conferred upon it by law. When

created by Act of Congress or lawful executive order, its powers must be found in the act or order. When such powers are not expressly conferred, they may exist only by clear and manifest intendment from express grants. Power over and affecting the *life, liberty, property and security of the citizen* may not be taken by inference, but only when the statute under which it is claimed demonstrates a plain intent to grant it.

In *Interstate Comm. Comm.* v. *Cincinnati etc. R. Co.*, 167 U. S. 479, 494-495, 505, 509, 42 L. ed. 243, Mr. Justice Brewer, speaking for this Court with reference to the power to fix rates, said:

> "That Congress has transferred such a power to any administrative body is not to be *presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct.*"

2 Lewis' Sutherland on Statutory Construction, sec. 627, pp. 1136-1137; sec. 630, p. 1140; sec. 569, p. 1053; sec. 572, pp. 1056-1057; sec. 573, pp. 1058-1060; sec. 562, p. 1046; sec. 564, p. 1048; sec. 565, pp. 1048-1049; sec. 546, p. 1019; sec. 493; pp. 921-922; sec. 499, p. 931; secs. 520-525, pp. 963-974; sec. 720, pp. 1310-1311.

*Potter's Dwarris on Statutes*, 224.
59 C. J., pp. 1127-1128.

There can be no intent of a statute not embraced in its words, and a legislative intention not expressed in some appropriate manner has no legal existence.

*Dewey* v. *U. S.*, 178 U. S. 510, 44 L. ed. 1170.
*Lee Bros.* v. *Cran*, 63 Conn. 433.
*Union Life Ins. Co.* v. *Champlin*, 116 Fed. 858 (C. C. A.).

The *"policy of the government"* in reference to any particular subject of legislation is too *"uncertain"* and *"a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes."*

*Dewey* v. *U. S.*, 178 U. S. 521, 44 L. ed. 1174.
*Haddon* v. *Collector*, 5 Wallace, 111, 18 L. ed. 519.

"The construction must be liberal in favor of private right, and construction which implies an intention to deny valuable rights should be avoided; statutes are presumed to be passed in full recognition of the constitutional rights of the citizen."

*Frazier* v. *Leas*, 127 Md. 575.

The Act specifically enumerates the powers and describes the duties of the Board. It is surely to be presumed that every power of considerable importance and extent is *expressed* in the Act. The only power, having any inherent and substantial relation to the abrogation of contracts, is the power given to the Board to investigate and ascertain the facts in the matter of *representation* of groups or units of employes for *collective bargaining* with their employers. That power is given and defined by Section 9 of the Act. It is a power of investigation. And, in order to render such an investigation effective, to order an election, by the group or unit of employes in question, of a representative or representatives for the designated purpose. Such election is to be determined by a

majority of the employes voting. It may be held under the direction of the Board, whose officers or agents ascertain the results and report them to the Board, which in turn certifies the result to the employer and employes concerned.

Under the Fifth Amendment, Congress cannot constitutionally deprive citizens of their property without due process of law by impairing the obligation of a contract.

*Hepburn* v. *Griswold,* 8 Wallace, 623-624.
*Carter* v. *Carter Coal Co.,* 298 U. S. 310-311, headnotes 24, 25, 80 L. ed. 1188-1189.
*Schechter Poultry Corp.* v. *U. S.,* 295 U. S. at p. 537, 79 L. ed. 1584.
*Eubank* v. *Richmond,* 226 U. S. 137, 57 L. ed. 156.
*Washington ex rel. Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, 121-122, 73 L. ed. 210, 213-214.
*Hitchman Coal, etc. Co.* v. *Mitchell,* 245 U. S. 251-252.
*Lamb* v. *Chaney & Son,* 227 N. Y. 418.

In *Hepburn* v. *Griswold, supra,* it was laid down by Mr. Chief Justice Chase that the spirit of the prohibition against impairing the obligation of contracts pervades the entire body of legislation by the Federal Government and that an act of Congress whose direct prohibition impairs the obligation of contracts is inconsistent with the spirit of the Constituton. The Chief Justice found support for this view in the Fifth Amendment to the Federal Constitution, declaring that private property shall not be taken for public use, without compensation, and particularly that the provision of that Amendment that "no person shall be deprived of life, liberty or property, without due process of law" must be construed "as a direct prohibition of legislation" impairing the obligations of

contracts. And the Chief Justice added: "It is not doubted that all the provisions of this Amendment operate directly in limitation and restraint of the legislative powers conferred by the Constitution."

See also Sutherland, Notes on United States Constitution, pages 641-643; 646-649.

12 C. J., Constitutional Law, sec. 956, pp. 1190-1192; sec. 958, pp. 1192-1194; sec. 961, pp. 1195-1196.

*2 Cooley Const. Lims.* (8th Ed.), p. 824.

*Meyer* v. *Nebraska*, 262 U. S. 390, 67 L. ed. 1042.

*Lochner* v. *New York*, 198 U. S. 45, 49 L. ed. 937.

In *Willoughby on the U. S. Constitution* (2nd ed.), sect. 1196-1800, *et seq.*, it is said:

> "No *specific* inhibition is laid upon the Federal Government by the Constitution with reference to the impairment of the obligation of contracts. *The Government is, however, forbidden by the Fifth Amendment to deprive persons of property without due process of law and without just compensation. In so far, then, as contract rights may be treated as property, they are protected from direct impairment by federal action.* This was definitely declared in the first legal tender decision of *Hepburn* v. *Griswold*, 8 Wall. 603."

There is nothing inconsistent with the above well-settled and salutary principles in the *Mackay Case*, 304 U. S. ——— or in the *Jones and Laughlin Steel Corporation* Case, 301 U. S. 1, 48, *et seq.* Both of those cases had to do with the reinstatement of employes discharged in violation of the National Labor Relations Act, and it was with reference to forbidden discriminations in cases of individual employments that this Court said, in the *Mackay*

*Radio and Telegraph Company* Case, that in the exercise of the commerce power, Congress may impose upon contractual relations reasonable regulations calculated to protect commerce against threatened industrial strife. *N. L. R. B.* v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1, 48. The Board's order there sustained required the reinstatement of discharged employes. The requirement interfered with freedom of contract which the employer would have enjoyed except for the mandate of the statute. The provision of the Act continuing the relationship of employer and employe in the case of a strike as a consequence of, or in connection with, a current labor dispute is a regulation of the same sort and within the principle of our decision. Neither the specific decisions in the cases cited, nor the principle upon which they rest with reference to the imposition of "reasonable regulations", sustain the power herein attempted to be exercised by the Board under the guise or pretense of imposing reasonable regulations, absolutely and utterly to destroy existing contracts of labor organizations of long established standing and embracing more than 30,000 employes of a general employer, and recognized as important affiliates of such a nation-wide body as the American Federation of Labor, and particularly where no question of representation was involved in the case and neither Section 8 (2) nor Section 9 of the Act applies to the case. To abrogate and annul contracts of over 30,000 out of 38,000 employes of the Consolidated Edison System without a charge or complaint in the pleadings in the case that the contracts of these employes were made without proper representation, without any question of representation being raised, and without, if such question had been raised, an investigation thereinto as particularly pro-

vided by the Act, and without the contracts themselves being brought into issue, and without the labor organizations of so many thousands of employes themselves being given notice or made parties before the acting tribunal, may hardly, it is respectfully submitted, be regarded as within "reasonable regulation" in the exercise of the commerce power. And when, in addition to all this, we find the power exercised *without the hearing inherent in fair play and due process*, it would seem that the last vestige of reasonableness in the exercise of the power is eliminated.

## VI.

**Many substantial parts of the testimony upon which the findings and decision of the Board purport to rest, and its course of proceeding to its final Order, violated basic requirements of evidence and procedure essential to due process of law.**

The numerous rulings of the Trial Examiner over hundreds of objections to testimony, were affirmed, *en masse*, in one indiscriminate fiat of the Board (1 R. 71), and ratified by the Court below without other reason than that hearsay is admissible in Board proceedings. Much of such illegal testimony was made the basis in great part of the Board's decision and Order, which were rendered without that lawful evidence required by just judicature as indispensable to judicial dealings with substantive rights.

The due process clause assures a *full hearing* before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence, to be fairly heard, and to have judicial findings based upon the evidence and hearing.

*B. & O. R. Co.* v. *United States*, 298 U. S. 368-369, 80 L. ed. 1224.

*Ohio Water Co.* v. *Ben Avon*, 253 U. S. 287, 64 L. ed. 908 and the other decisions cited in note 29 appended to the text of 80 L. ed. 1224.

*Morgan* v. *United States*, 298 U. S. 468, 40 L. ed. 1288.

*Morgan* v. *United States*, 304 U. S. 1.

*Brown* v. *Mississippi*, 297 U. S. 286, 287, 80 L. ed. 687. 688.

*Hebert* v. *Louisiana*, 272 U. S. 312, 316, 71 L. ed. 272.

There are in the Record (pages 162-1316, Vols. 1, 2 and 3), over 200 exceptions taken by counsel for the Consolidated Edison Companies, to rulings of the Trial Examiner upon the admission and exclusion of testimony. As will be seen by reference to the rulings excepted to, objections were interposed because of general incompetency of much of the alleged evidence, and, more specifically, because second and third degree hearsay and other remote testimony, facts not in issue or embraced within the pleadings, secondary evidence when the best was obtainable, evidence not binding on the Consolidated Edison Companies, conclusions and arguments of witnesses for the Board, and vague, indefinite, unresponsive, self-serving testimony, and testimony based on rumor, were allowed into the Record by the Trial Examiner.

As it would unduly prolong this discussion to state herein the reasons in support of the many objections, or even to enumerate the exceptions themselves, this Honorable Court is respectfully referred to the reasons offered by counsel for the Companies at the time of the hearing. As illustrations of typical instances of the admission of matter in violation of the substantial rule of evidence guaranteed by due process of law for the protection of

substantial rights, see Record, pages: 214-215; 221; 224-225; 226-227; 228-229; 251; 255; 256-257; 261-262; 273; 275; 279-285; 309-320; 446-447; 448-450; 453-454; 458-469; 522-526; 554; 555; 603; 619; 732-733; 764-765; 883; 884; 888; 889; 960; 1023; 1044-1045; 1098-1100; 1161; and 1162.

When, on September 29, 1937, the Board directed that the case be transferred and continued before it, pursuant to Article II, Section 37 of the Rules, the result was that the Trial Examiner made no intermediate report as contemplated by Section 32, and there was no opportunity afforded to file exceptions to the report as contemplated by Section 34. No opportunity was presented either to file briefs or argue orally before the Board. With regard to this kind of procedure, the Court below felt impelled to observe:

> "This procedure is not one likely to inspire confidence in the impartiality of the proceedings. *It results in findings of fact being made by persons who did not see the witnesses—a matter which may have far-reaching consequences in view of the very limited power conferred upon the courts to review the Board's findings of fact.*"

In *Morgan* v. *U. S.*, 298 U. S. 468, L. ed. 1288, involving an order of the Secretary of Agriculture under an Act of Congress, this Court, referring to the duties and powers of the Secretary under the Statute, said:

> "There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. • • •
>
> "A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings has a quality resembling that of a judicial proceed-

ing. Hence, it is frequently described as a proceeding of quasi-judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which *evidence is received and weighed by the trier of the facts.* * * * *The 'hearing' is the hearing of evidence and argument.* If the one who determines the facts which underlie the order has *not considered evidence* or argument, it is *manifest that the hearing has not been given.*"

In *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88, 33 S. Ct. 185, 57 L. ed. 431, in construing a federal Statute relating to hearings before an administrative body in connection with rate-making, this Court said (p. 91):

"But the statute gave the right to a *full hearing*, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the *facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government.* It would mean that where rights depended upon *facts*, the Commission could *disregard all rules of evidence*, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another, *is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.*

"In the comparatively few cases in which such questions have arisen, it has been distinctly recognized that administrative orders, quasi-judcial in character, are void if a hearing was denied; *if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'* * * *"

Consolidated Edison and its affiliates were not given a hearing upon the amended Complaint against them after the close of the testimony before the Trial Examiner on July 6, 1937. Although they filed a brief, on July 15, with the Trial Examiner, the case rested and slept until the Board by its Order of September 29, 1937, required it to be *"transferred and continued"* before itself. Counsel for Consolidated Edison Companies were informed of that Order. They had previously requested the Board to be heard specifically upon the question of jurisdiction. (1 R. 19 to 23, 39). They never heard anything more from the Board until informed that it had disposed of the case by its Final Order of November 10, 1937. The Trial Examiner neither gave them a lawful *hearing* upon the evidence, nor did he formulate, as the Act provides, an Intermediate Report upon the testimony, and transmit such a Report to the Board. From and after July 6, he remained inactive and silent. The Board did likewise from July 6, to September 29, 1937, when its silence and inaction were momentarily interrupted only by its Order that the case be "transferred and continued" before it, following which its silence and inaction were resumed and continued until it suddenly launched its bolt of November 10, 1937. It gave no notice of any hearing; it invited to no hearings; it neither asked for, nor authorized, any appearance, argument or advices from the Counsel for Consolidated Edison. It had no Intermediate Report, nor had the Counsel for the Companies any —because none had been made. It had a voluminous record of testimony and exhibits embracing thousands of typewritten pages. The proceeding dealt with a system of seven corporations supplying a public utility to a community of some ten million people and with a veritable army of employees exceeding 38,000 in number—all cen-

affected of *the claim against him*, or of *the proposed action upon it, no opportunity to contest* the questions of fact which it presents by the cross-examination of the claimant's witnesses or the presentation of his own, and *no chance to be heard* upon the questions of law which it involves. *It considers without notice, condemns without hearing, and renders judgment without trial.* The order of the referee was unlawful and void."

After the amendments of June 14 in the Complaint, there was *no service whatsoever* of said Complaint so amended, nor of *any notice of hearing thereon* made or attempted by the Board, Regional Director, or Trial Examiner *upon any of the Petitioners herein.* As the amendments of June 14, 1937, of the Complaint made the *first* and *only* complaint or charge *affecting commerce within the Act* against the Brotherhood, the undeniable and indisputable facts above stated present a case to this Honorable Court of an Order of the Board entered upon a Complaint and striking down valuable property and personal rights of the Brotherhood and the Local Unions without legal service upon, or notice to, them or any of them, of any charge or complaint within the very same Act of Congress under which the Order of the Board purported to have been rendered, and from which alone the Board derived whatever jurisdiction or authority it possessed. The statement of such a proceeding demonstrates its illegality. If these Petitioners had none of the other grounds of objection herein preferred against the Order, this ground, it is respectfully submitted, suffices to establish its illegality and nullity.

## IV.

**The Act does not authorize the Board to exercise jurisdiction over the Consolidated Edison and its subsidiaries and their labor relations with their employes, or over the subject matter of the Complaint or Amended Complaint, including Petitioners' contracts which the Order destroyed, because said Companies and Local Unions are not engaged in, and their labor relations do not burden, "commerce" as defined in the National Labor Relations Act, the business of the Companies and their employes being wholly within New York, by the Statutes of which they are subject to full and complete regulation. The Act, as herein applied by the Board, conflicts with the Fifth and Tenth Amendments to the Federal Constitution.**

The basic question of jurisdiction here presented is so luminously discussed in the Brief of the Consolidated Edison Company of New York, Inc., and its affiliated Companies, filed in this Court in these consolidated cases, that, in order to avoid repetition and prolixity herein, we respectfully beg to refer this honorable Court to that Brief. The earlier decisions of this Court on the subject in question are reviewed in the recent cases of *Carter* v. *Carter Coal Co.*, 298 U. S. 238-341; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495-550; the *Jones & Laughlin* case, 301 U. S. 1; the *Freuhauf* case, 301 U. S. 53; *Friedman-Marks* case, 301 U. S. 72; and the recent *Santa-Cruz Fruit Packing Co.* case, decided by this Court March 28, 1938. It is respectfully submitted that the four decisions last named do not destroy the distinctions between interstate and intrastate commerce settled and preserved by this Court from the foundation of the Federal Government.

tered in and serving important sections of the Empire State of the Union and its great business and commercial Metropolis. Moreover, the Board felt itself authorized to treat and act upon, as within the Complaint before it, important contracts wherein were involved the labor, services and vital welfare of over 30,000 employes, the large and important business of the several Companies, and the comforts, conveniences and essential needs of millions of people, and also a most important and delicate constitutional question of conflicting authority and jurisdiction between a State and the Federal Union. In spite of all that, the Board never gave the Consolidated Edison Companies a *hearing* from the time its Trial Examiner closed the taking of testimony before himself until it closed the case by final judgment against the Consolidated Edison Companies.

With respect to the Brotherhood and the Local Unions of employes of the Companies, neither notice nor hearing was given them or any of them, by the Board, its Director or Examiner, at any stage of the proceeding from beginning to end.

In *Morgan* v. *U. S. et al.*, 298 U. S. 468, this Court said:

> "But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, *the recitals of his procedure cannot be regarded as conclusive.* Otherwise, the statutory conditions could be set at naught by mere assertion. If upon the facts alleged, the 'full hearing' required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside. Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirements of due process as to notice and hearing. For the statute itself demands a full hearing and the order is void if such a hearing was denied."

In the second *Morgan case* (304 U. S. 1), although all parties affected had been duly joined as parties and had appeared and taken part in the proceedings, an Order of the Secretary of Agriculture was declared invalid by this Court. On the crucial question of the sufficiency of the hearing, this Court said:

"The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. . The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by *adherence* to the basic principles that the legislature shall appropriately determine the standards of administrative action and *that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'* * *

"Congress, in requiring a 'full hearing', had regard to judicial standards.—not in any technical sense but with respect to those *fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature.* * * * The requirements of fairness are not exhausted in the taking or consideration of evidence but *extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.*

"The *maintenance of proper standards* on the part of administrative agencies in the performance of their quasi-judicial functions is of the *highest importance* and in no way cripples or embarrasses the

exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purpose for which they are created and endowed with vast powers, *they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.*"

*National Board* v. *Mackay Radio & Tel. Co.*, 304 U. S. ——, which involved questions as to the propriety of the procedure leading up to a final order, is authority for the proposition that substantial rights must be respected in these kinds of cases. This Court there held that deviations from the usual practice in that case did not call for the reversal of the order, only because:

> "* * * *the issues and contentions of the parties were clearly defined and* * * * *no other detriment or disadvantage is claimed to have ensued from the Board's procedure* * * *."

but clearly stated that:

> "*The respondent was entitled to know the basis of the complaint against it, and to explain its conduct, in an effort to meet that complaint,* * *"

In that case, unlike the instant one, *the party affected had been duly joined as a party and fully notified of the complaint against it, attended and took part in the hearing, and, when the matter was transferred before the Board at Washington, argued the cause orally and filed a brief.* Although there, a technical change in the charge was made by the Board after the original complaint had been filed, and no intermediate report was filed by the trial examiner, *the party aggrieved was throughout the proceedings fully apprised of all charges and relief sought*

*against it.* Such a situation, where mere technical omissions are relied upon, and "no other detriment or disadvantage is claimed," is obviously different from such a one as the instant case discloses, where valuable personal and property rights are taken away by an Order passed without the persons affected being either joined as parties or afforded legal notice of the proceedings, where the charge, complaint and amended complaint make no issue of the rights destroyed, where counsel for the Board affirmatively states that no issue of representation exists, and where no opportunity whatsoever, either by filing an intermediate report or otherwise, is afforded persons vitally affected to be fairly and fully heard, to explain their conduct in an effort to meet the complaint and to defend against it. In reaching its conclusion in the *Mackay* case, the Court expressly based it on the controlling facts that:

> "It appears that oral argument was had and a brief was filed with the Board after which it made its findings of fact and conclusions of law. * * * What we have said sufficiently indicates that the issues and contentions of the parties were clearly defined and as no other detriment or disadvantage is claimed to have ensued from the Board's procedure the matter is not one calling for a reversal of the order. * * *"

See also—

*St. Joseph Stock Yards* v. *United States*, 298 U. S. 38, 73.

*Interstate Commerce Comm.* v. *L. & N. R. Co.*, 227 U. S. 88, 91, 57 L. ed. 431.

*Chicago, etc. R. Co.* v. *Minnesota*, 134 U. S. 457.

*Windsor* v. *McVeigh*, 93 U. S. 274.

*Riverside Mills* v. *Menefee*, 237 U. S. 189.

*Roberts* v. *Anderson et al.* (C. C. A. 10), 66 Fed. (2) 874.

*In re Rosser*, 101 Fed. 562.

## CONCLUSION.

It is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Second Circuit, refusing to set aside the Order of the National Labor Relations Board of November 10, 1937, and directing that the request of the Board for the enforcement of said Order be granted, was and is erroneous in the particulars and for the reasons hereinabove set out, and that the same should be reversed.

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